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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session, 30 November-4 December 2015

Opinion No. 45/2015 concerning Nguyen Viet Dung (Viet Nam)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.

2. In accordance with its methods of work (A/HRC/30/69), on 29 September 2015 the Working Group transmitted a communication to the Government of Viet Nam concerning Nguyen Viet Dung. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);



(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Nguyen Viet Dung, born on 19 June 1986, is a citizen of Viet Nam and usually resides in Yen Thanh district, Nghe An Province, Viet Nam.

5. Mr. Dung, a graduate in electrical engineering, had, in early April 2015, declared his intention to set up a Public Party of Viet Nam in order to promote human rights and the idea of multiparty democracy in the country.

6. The source alleges that, on 12 April 2015, Mr. Dung was arbitrarily detained. In the morning of that same day, Mr. Dung had attended a peaceful protest of about 100 activists, held against the large-scale cutting of trees in the city centre of Hanoi. According to the source, the demonstration ended without any clashes with the local police. After the protest, however, Mr. Dung and four other individuals were approached by the police, who claimed they were causing public disorder. Mr. Dung and the other four individuals were then detained by the Hanoi City police in the Hoan Kiem district.

7. The four individuals who were detained together with Mr. Dung were released two days later, on 14 April 2015. Mr. Dung, however, continued to be kept in custody. On 19 April 2015, the Hoan Kiem district police issued an arrest warrant on the basis of Mr. Dung's alleged violation of article 245 of the Criminal Code of Viet Nam. Mr. Dung was thus accused of causing public disorder.

8. The source reports that Mr. Dung is currently being kept in Detention Facility No. 1 of Hanoi City's police department while the department's investigation agency looks into his political activities. The first interrogation, attended by Mr. Dung's lawyer, took place on 23 September 2015. The second interrogation is still pending. After the second hearing, the case is scheduled to be transferred to the Prosecutor's Office for the first hearing.

9. The source submits that the deprivation of liberty of Mr. Dung falls under categories II and V. With regard to category II, the source alleges that the arrest and continued deprivation of liberty of Mr. Dung are a result of his peaceful legal activities carried out in accordance with the Constitution of Viet Nam. The source argues that Mr. Dung has been deprived of his liberty for reasons of discrimination based on his political opinion which aims towards or can result in ignoring the equality of human beings (category V).

Response from the Government

10. The Working Group regrets that the Government has not responded to the allegations transmitted to it on 29 September 2015.

Discussion

11. The Working Group addressed a communication to the Government of Viet Nam requesting detailed information about the above-mentioned allegations as well as about the current situation of Mr. Dung and a clarification of the legal provisions justifying his continued detention.

12. Despite the absence of any information from the Government, the Working Group considers that it is in a position to render an opinion on the case on the basis of the submissions that have been made in conformity with paragraph 16 of its methods of work.

13. In the present case, the Government has chosen not to rebut the *prima facie* reliable allegations submitted by the source. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues (see A/HRC/19/57, para. 68). If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the given allegations. Hence, the Working Group should base its opinion on the *prima facie* case made out by the source.

14. At the outset, with regard to violations of national legislation, the Working Group wishes to reaffirm that any national law touching upon arrest and detention should be made and implemented consistent with the relevant international provisions set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments to which the State concerned has acceded. Consequently, even if the arrest and detention are in conformity with national legislation, the Working Group must ensure that such detention is also consistent with the relevant provisions of international human rights law.

15. In this context, the vagueness of the provisions and their overbroad application of a law might render the law itself at odds with the relevant norms of international law on the administration of criminal justice. In the view of the Working Group, article 245 of the Criminal Code of Viet Nam and its possible expansive application can be a source of the same concern.

16. Given the overall situation that prompted and resulted in the arrest and detention of Mr. Dung, the Working Group considers that the deprivation of liberty of Mr. Dung falls under categories I and III. The concluding facts on this point include the following chain of events: (a) that he was arrested on 12 April 2015 without the presentation of any arrest warrant and proper notification of the charges against him; (b) that the arrest warrant and the charges were presented on 19 April 2015, eight days after the date of the arrest, by the police and not the prosecution; (c) that he has been subjected to prolonged pretrial detention over a period of eight months at the police department; (d) that, even at the police station, delays and maladministration of justice were manifest as only one interrogation was conducted, on 23 September 2015.

17. The Working Group confirms that the deprivation of liberty of Mr. Dung is in violation of article 9 of the Universal Declaration of Human Rights banning the practice of arbitrary arrest and detention, which is a deeply entrenched human rights norm, reflected in both State practice and *opinio juris*. It was also conducted in violation of article 9 (1) of the International Covenant on Civil and Political Rights, which stipulates: “No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

18. Breaches of law have also been made with regard to article 9 (2), which clarifies that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

19. Article 9 (3) of the Covenant sets forth two cumulative obligations, namely to be brought promptly before a judge within the first days of the deprivation of liberty and to have a judicial decision rendered without undue delays, in the absence of which the person is to be released (see A/HRC/19/57, para. 53).

20. This provision is completed by the second part of article 9 (3), which provides that “it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement”. It follows that

liberty is recognized as a principle and detention as an exception in the interests of justice (see A/HRC/19/57, para. 54).

21. The Working Group also wishes to refer to paragraph 38 of general comment No. 35 (2014) on liberty and security of person, in which the Human Rights Committee states that it should not be the general practice to subject defendants to pretrial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.

22. With regard to the application of category III, in particular, as classified by the Working Group, the Group notes with concern that the pretrial detention that has lasted about eight months, as specifically shown in the case of Mr. Dung, constitutes a clear violation of the part of the well-established international law on detention that stipulates that pretrial detention should be an exception and should be as short as possible.¹ In its 2011 annual report (see A/HRC/19/57, paras. 48–58), the Working Group also underlined that pretrial detention should be an exceptional measure.

23. The right to a fair trial is well established in international law, especially under articles 10 and 11 of the Universal Declaration of Human Rights. In particular, article 10 of the Declaration stipulates that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 9 (4) of the International Covenant on Civil and Political Rights also stipulates that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. The deprivation of liberty of Mr. Dung is arbitrary under the above-mentioned standards of the international norms on detention.

Disposition

24. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Nguyen Viet Dung, being in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 (1)-(4), 10 and 11 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III of the categories applicable to the consideration of the cases submitted to the Working Group.

25. Consequent upon the opinion rendered, the Working Group requests the Government of Viet Nam to take, without delay, the steps necessary to remedy the situation of Mr. Dung and bring it into conformity with the standards and principles enshrined in the International Covenant on Civil and Political Rights.

26. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be the immediate release of Mr. Dung and the provision of reparation in accordance with article 9 (5) of the International Covenant on Civil and Political Rights.

[Adopted on 3 December 2015]

¹ See, for example, Human Rights Committee, communication No. 1787/2008, *Kovsh (Abramova) v. Belarus*, Views adopted on 27 March 2013, paras. 7.3-4.